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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF GENERAL COUNSEL

memorandum

TO: William Caton
Acting Secretary

FROM: William E. Kennard *(init)*
General Counsel

SUBJECT: Ex Parte Communication in CS Docket No. 95-184

DATE: May 7, 1996

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Attached are the original and two copies of a letter from Barry A. Pineles concerning CS Docket No. 95-184, In the Matter of Telecommunications Services Inside Wiring, and two copies of my response thereto, for placement in the public file pursuant to 47 C.F.R. § 1.1206(a).

Attachments

OH



Federal Communications Commission
Washington, D.C. 20554

May 7, 1996

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Barry A. Pineles, Esq.
Bienstock & Clark
Suite 3160
200 South Biscayne Boulevard
Miami, FL 33131-2367

Dear Mr. Pineles:

Thank you for your letter of April 22, 1996, regarding CS Docket No. 95-184, In the Matter of Telecommunications Services Inside Wiring. You indicate that the issues raised in your letter have also been raised in your comments filed in that proceeding. The issues will be addressed in the Commission's Report and Order.

CS Docket No. 95-184 is a non-restricted notice and comment proceeding requiring disclosure of ex parte communications. See 47 C.F.R. § 1.1206(a). Therefore, I have asked the Acting Secretary of the Commission to place copies of your letter and this response in the public file in that docket.

Sincerely,

A handwritten signature in black ink, appearing to read "Will Kennard", is written above the typed name.

William E. Kennard
General Counsel

cc: Public file in CS Docket No. 95-184

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Barry A. Pineles
Admitted in D.C. Only

April 22, 1996

Mr. William Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, DC 20554

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Dear Mr. Kennard:

I have been asked by the Cable Telecommunications Association (CATA) to write you concerning the Commission's compliance with the Regulatory Flexibility Act, 5 U.S.C. §§ 601-12 (RFA), in CS Docket No. 95-184 as well other dockets. CATA, as it expressed in its comments on the Notice of Proposed Rulemaking in CS Docket No. 95-184, is troubled by the Commission's failure to proffer a proposed rule and provide an analysis of alternatives as required by the RFA. In order to avoid protracted litigation concerning Commission compliance with the Administrative Procedure Act and RFA, CATA strongly urges the Commission to rescind its notice of proposed rulemaking in CS Docket No. 95-184 and reissue it as a notice of inquiry.

When President Clinton signed legislation authorizing an increase in the debt ceiling, he also signed into law the Small Business Regulatory Enforcement Fairness Act of 1996 which amended the RFA. The amendments to the RFA will affect the way the Commission performs initial regulatory flexibility analyses.

As you know, the RFA requires that federal agencies assess the impact of their proposed and final rules on small businesses and if that impact is significant prepare an initial regulatory flexibility analysis. In the alternative, an agency may certify that the proposed or final rule does not have a significant economic impact upon a substantial number of small entities.

The most critical element of an initial regulatory flexibility analysis is the examination of alternatives to the proposed rule that will reduce burdens on small business or increase the benefits to small businesses. In order to examine alternatives to the proposed rule, a proposed rule must be proffered in the notice of proposed rulemaking. As CATA has pointed out, the notice of proposed rulemaking in CS

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Docket No. 95-184 is almost completely devoid of proposed rules. Therefore, it is difficult, if not impossible, for any small business to comment adequately on the Commission's initial regulatory flexibility analysis.

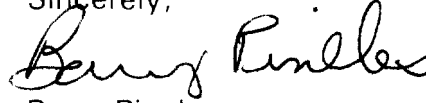
The Small Business Regulatory Enforcement Fairness Act of 1996 amends the RFA by requiring the Commission, in preparation of its final regulatory flexibility analysis, to provide a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such changes. The Act also adds the requirement that an agency must explain the factual, legal, and policy reasons for selecting the alternative in the final rule and why it rejected other available alternatives. Obviously, compliance with these requirements is predicated upon an agency having alternatives in the proposed rule. Since the Commission has retreated from providing specific proposed rules in many of its rulemaking dockets, including CS Docket No. 95-184, it will be impossible for the Commission to comply with the amended RFA.

Prior to the enactment of the Small Business Regulatory Enforcement Fairness Act of 1996, an agency's compliance with the RFA only could be tested in a broader challenge to the rulemaking pursuant to the Administrative Procedure Act. An inadequate RFA analysis would not be grounds to overturn the rulemaking except in the rarest instances. *Thompson v. Clark*, 741 F.2d 401, 408 (D.C. Cir. 1984). However, the Small Business Regulatory Enforcement Fairness Act of 1996 amends the RFA to authorize "each court having jurisdiction to review such rule for compliance with section 553, or under any other provision of law, shall have jurisdiction to review any claims of noncompliance with sections ... 604 [final regulatory flexibility analyses], 605(b) [certifications] ... in accordance with chapter 7...." Pub. L. No. 104-121, § 342. Thus, the Commission compliance with the RFA will be separately reviewable in court.

The Commission's continued failure to provide the necessary groundwork for full compliance with the RFA is no longer simply a matter of good rulemaking practice. The FCC's failure to comply may now result in protracted legal proceedings to promulgate and enforce agency rules. CATA requests that the Commission rescind its notice of proposed rulemaking in CS 95-184 and reissue it as a notice of inquiry. In lieu thereof, the Commission may reissue the notice of proposed rulemaking with specific proposals and alternatives analyzed as required by the Regulatory Flexibility Act and as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.

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If you have any questions about this issue, please do not hesitate to contact me.

Sincerely,

Barry Pineles

BAP/nfm

cc: Steve Effros, Cable Telecommunications Association